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IN THE

Supreme Court of the United States

October Term, 1952.

No. [redacted]82

WILLIAM B. PORTNER,

Petitioner,

v.

CENTRAL PENN NATIONAL BANK OF PHILADELPHIA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

WILLIAM B. PORTNER, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 9, 1953.

OPINIONS BELOW.

The opinion and order of Chief District Judge Kirkpatrick of May 20, 1952, granting petitioner's motion to dismiss the complaint, is not reported, but appears in the transcript of record (R. 21-23). The opinion of the United States Court of Appeals for the Third Circuit of February 9, 1953, is reported at 201 F. 2d 607, and appears in the transcript of record (R. 28-32).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit of February 9, 1953 (R. 33) reversing the judgment of the United States District Court for the Eastern District of Pennsylvania on May 20, 1952 (R. 23) under Section 1254(1) of the Judicial Code, 62 Stat. 928 (1948) 28 USC Section 1254(1). The judgment of the Court of Appeals for the Third Circuit reversing the judgment of the District Court, remanding the case with directions to reinstate the complaint, and to proceed in accordance with the opinion of the Court of Appeals is reviewable under **United States v. General Motors**, 323 US 373, 377 (1945) since the ruling of the Court of Appeals for the Third Circuit is ". . . fundamental to the further conduct of the case", and under **Land v. Dollar**, 330 US 731, 734 (1947) because of the importance of the questions presented.

STATUTE INVOLVED.

The statute involved is the act approved November 7, 1918, *"An Act to provide for the consolidation of national banking associations"*, 40 Stat. 1043 (1918), 12 USC Section 33.[1]

STATEMENT OF THE MATTER INVOLVED.

This action is brought by the respondent bank under the Federal Declaratory Judgments Act.[2] Petitioner moved the United States District Court for the Eastern District of Pennsylvania to dismiss the Complaint[3] under Federal

1. Hereafter referred to as "the act." The text of the act is reproduced in Appendix "A" annexed hereto.

2. 28 USC Sec. 2201.

3. R. 2-6. The respondent prayed that the District Court ". . . adjudge and declare that defendant is not a dissenting shareholder within the meaning of the Act of Congress . . ." (R. 6).

Rule 12 on the ground, *inter alia,* that said complaint failed to state a claim upon which relief could be granted,[4] thereby admitting for the purposes of the motion well pleaded facts as the "hypothesis for decision".[5]

The act provides a clearly defined procedure to be followed by a non-assenting shareholder to a proposed plan of consolidation with another national banking association. Such rights were specifically given by the congress to "**any**" shareholder:

> ". . . **any shareholder** of any of the associations so consolidated, who has **voted against** said consolidation at the meeting of the association of which he is a shareholder or has **given notice in writing** at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the **value** of the shares so held by him . . . such value to be ascertained . . . by an **appraisal made by a committee of three persons** . . ."[6]

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4. R. 26.

5. **Collins v. Hardyman,** 341 US 651, (1951). By moving to dismiss the complaint, petitioner admitted the allegations of fact well-pleaded in paragraph 13 (R. 4-5) of the complaint, that petitioner purchased shares of the respondent bank ". . . for the sole purpose of dissenting from the proposed consolidation . . ." That part of paragraph 13 (R. 5) averring that the purpose of petitioner was to ". . . receive as the appraised value of the stock a sum substantially in excess of its market value and in excess of the price paid by him" can be read only in light of the statutory language, which provides that a non-assenting shareholder is entitled to the **appraised** value of his shares as eventually determined by an appraisal committee of three persons (one appointed by the shareholder, one appointed by the bank and a third appraiser appointed by the two so chosen) with final redetermination of the value of the shares to be made by the Comptroller of the Currency. Appendix "A," *infra,* p. 22.

6. Emphasis supplied. For full text see Appendix "A." The language of the Act of July 14, 1952, is practically identical, footnote 35 *infra.*

As appears from the allegations of the complaint, an agreement of consolidation was entered into between respondent bank and another national bank located in Philadelphia;[7] notice was given that the agreement would be presented for vote at the annual meeting of the shareholders of the respondent bank on January 12, 1952.[8]

Petitioner purchased 300 shares of respondent's stock on January 4, 1952.[9] Prior to the said meeting, petitioner gave the required statutory notice of dissent from the plan of consolidation, and after the meeting at which the agreement of consolidation was ratified, admittedly, took the necessary steps to have his shares appraised, in accordance with the procedure provided for in the act.[10]

Thereafter, the respondent bank instituted the present proceeding to ". . . obtain a judicial declaration that the [petitioner], who purchased capital stock of the plaintiff with **knowledge** of a pending consolidation between plaintiff and another National Bank, is not entitled to receive payment, as a dissenting shareholder, of the appraised value of the shares so purchased.[11] The complaint is framed on the theory that petitioner's "knowledge" of the pending consolidation and his desire to obtain an appraisal of the value of his shares and to be paid such value under the act, *ipso facto* removed him from the application of the act.

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7. Paragraph 5, complaint (R. 3).

8. Paragraph 7, complaint (R. 3-4).

9. Paragraph 8, complaint (R. 4). It is not alleged that petitioner purchased the shares other than in the open market.

10. Paragraph 12, complaint (R. 4).

11. Paragraph 4, complaint (R. 2). (Emphasis supplied.) See also the allegations of paragraph 15, that the act "does not give the rights to dissent and to receive payment for stock to shareholders who purchased their stock **while the consolidation was pending**; . . ." (Emphasis supplied.) The bank sought an injunction to restrain petitioner from proceeding with any steps for appraisal under the act.

The United States District Court for the Eastern District of Pennsylvania, *per* Chief District Judge Kirkpatrick, dismissed the complaint, holding that the act clearly gives the right to receive the appraised value of his shares (whatever that ultimately is determined to be by the appraisal committee and/or the Comptroller of the Currency as the final arbiter) to "**any**" non-assenting shareholder to the plan of consolidation who has complied with the objective standards of the act by **voting** against the plan or giving the statutory **notice** of dissent from the plan to the presiding officer of the meeting.

Chief Judge Kirkpatrick held that to deny to petitioner rights so clearly given by the congressional text to "**any**" shareholder would constitute an ". . . **unwise entry into the field of judge-made law.**" [12]

Two judges [13] of the Court of Appeals for the Third Circuit reversed by holding that even though a non-assenting shareholder has complied with the requirements of the act by voting or giving notice, such shareholder may be

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12. R. 22. Chief District Judge Kirkpatrick stated: "Courts have, on occasion, construed statutes so as to exclude persons and situations within the plain letter of the law. Such interpretation, however, should not be resorted to except where the intent of Congress, in derogation of what it has so said, so clearly appears as to admit of no doubt. If a literal interpretation, applied to a particular situation, would lead to an obviously absurd or a grossly unjust result, it may be assumed that Congress did not intend the letter to be followed, but the departure from language whose ordinary meaning is unmistakable, unless very carefully guarded may result in an **unwise entry into the field of judge-made law.**" (Emphasis supplied.)

13. The case was argued before Chief Judge Biggs of the Court of Appeals for the Third Circuit, who wrote the Opinion of the Court, and Circuit Judges Goodrich and Staley. Circuit Judge Staley concurred in a separate opinion (R. 31-32).

deprived of his right to secure an appraisal of his shares and to receive the appraised value ultimately determined, depending upon an investigation into his subjective "**motives and hidden sentiments**".[14] It was held that even though a shareholder dissents from the plan of consolidation by voting or giving the notice provided for in the act, if he desires to receive the appraised value of his shares he then somehow ceases to be a "bona fide" dissenter,[15] and falls into a category of persons seeking to perpetrate what the Court of Appeals characterizes, impliedly, as a fraud. If the shareholder is motivated, the Court of Appeals holds, by a desire to make a profit (even though the value of his shares must be determined by an appraisal committee of three persons, only one of whom is selected by the shareholder, and the Comptroller of the Currency has final and unappealable discretion in fixing the final value) and such shareholder believes (with or without real foundation) that the committee and/or the Comptroller of the Currency may evaluate his shares at a figure higher than his purchase

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14. Circuit Judge Staley in his concurring opinion stated (R. 31-32):

> "I think that the majority has opened a Pandora's box when it permits inquiry into **motives or hidden sentiments** by corporate officials or by the courts in order to determine whether one has assented to or dissented from a corporate act. This would impose an intolerable burden of inquiry upon those who conduct corporate elections, and, as a precedent, would open a new door to litigation with regard to corporate affairs. * * *" (Emphasis supplied).

15. R. 30. Although the Court of Appeals would appear to make the state of mind of the shareholder at the time he votes or gives notice contra the plan of consolidation as controlling, it will be noted that the complaint contains no allegation that petitioner was not a "bona fide" **dissenter**. The complaint is framed upon the shareholder's state of mind at the time of purchasing the shares; the theory apparently being that petitioner did not become a "bona fide" **shareholder**.

price, or higher than the figure at which he might then sell his shares to others,—then such shareholder is deprived of the rights of the act because of such **"motives and hidden sentiments."** And this rule would be applied, it seems, to shareholders, who purchase shares "with knowledge" of the pending consolidation, or who purchase shares prior to the official announcement of the plan of consolidation.[16] Under this rule, all shareholders—regardless of when they acquired their stock—who seek the appraised value by dissenting (but meanwhile hoping that the merger goes through) are guilty of a "sham", and lose their statutory rights.

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16. The impact of the opinion of the Court is that one who has been a shareholder for 25 years in the association who gives notice of dissent to the presiding officer at the meeting, or who votes against the plan at the meeting, if it be shown that he desires to receive the appraised value of his shares upon the "belief" that it may be subsequently determined by the committee and/or Comptroller of the Currency to be higher than his original purchase price, is guilty of "fraud." *Sed quaere*—are not all stock market transactions spurred by the hope of a profit? To put the position of the respondent most strongly in its favor,—because of petitioner's "belief" and, yes, perhaps, even "desire" that the appraised value, to be determined, may be higher than his purchase price, then his notice of dissent is not "bona fide." The holding of the Court of Appeals is, of course, entirely bottomed upon the **assumption** that the value of the shares to be determined by the committee and/or Comptroller ultimately will be higher than his purchase price. The determination of the said value being in the hands of those not under the control of the shareholder—the committee and the Comptroller—it is not easy to understand the charge of "fraud."

QUESTION PRESENTED.

Since the act permits national bank to consolidate, but, in addition, provides that any non-assenting shareholder to a plan of consolidation who complies with the specific statutory procedure with respect to notice of dissent is entitled to receive the appraised value of his shares, did not the United States Court of Appeals for the Third Circuit err in reversing the District Court's refusal to engage in judicial legislation by reading into the act in addition to the objective requirement of statutory notice of dissent (or a vote contra the plan) an intention of congress to entirely foreclose a non-assenting shareholder from the rights given to **any** non-assenting shareholder, depending upon his subjective "**motives or hidden sentiments**"?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. In reversing the judgment of the District Court for the Eastern District of Pennsylvania, and in reading into the act in addition to the requirement of the statutory notice of dissent (or vote contra the plan) an intention on the part of the congress to foreclose a particular non-assenting shareholder from the rights given by the act to **any** non-assenting shareholder, to receive the appraised value of the shares, depending upon the subjective "**motives or hidden sentiments**" of such non-assenting shareholder in giving the association of which he is a shareholder the statutory notice of dissent,—the United States Court of Appeals for the Third Circuit indulged in judicial legislation, and so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

2. In so holding, the Court of Appeals for the Third Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

3. In so holding, the United States Court of Appeals for the Third Circuit decided a federal question in conflict with the applicable decisions of this Court on the interpretation of federal statutes.

4. The decision of the Court of Appeals for the Third Circuit that a particular non-assenting shareholder to a plan of consolidation may be deprived of his right to receive the appraised value of the shares (which right is given by the congress to **any** non-assenting shareholder), and in making both operative and controlling an inquiry into his subjective **"motives or hidden sentiments"**, gives rise to a conflict with the Seventh Circuit which held in **Roach v. Stastny** [17] that a non-assenting shareholder **dissents** within the meaning of the act by giving the statutory **notice** of dissent; and gives rise to a conflict with the Fifth Circuit which held in **Hiatt v. Peddy** [18] that the act must be literally construed and its plain meaning given effect.

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17. 104 F. 2d 559 (CCA 7th, 1939).
18. 73 F. 2d 235 (CCA 5th, 1934).

Argument.

I.

ANY NON-ASSENTING SHAREHOLDER TO A PLAN OF CONSOLIDATION WHO FILES A STATUTORY NOTICE OF DISSENT (AND/OR VOTES CONTRA THE PLAN) IS ENTITLED TO RECEIVE THE APPRAISED VALUE OF HIS SHARES, FIXED IN ACCORDANCE WITH THE PROCEDURE DEFINED BY THE ACT, AND WITHOUT REFERENCE TO AN INQUIRY BY THE ASSOCIATION OF WHICH HE IS A SHAREHOLDER OR THE COURTS INTO HIS SUBJECTIVE "MOTIVES OR HIDDEN SENTIMENTS".

The federal act in question has its counterpart in the corporate codes of a majority of states. Prior to the enactment of such legislation permitting consolidations, the non-assenting minority of a corporation had the power to effectively stalemate corporate action leading to a consolidation or merger, because the rule required the unanimous consent of all shareholders. Such legislation permitting consolidation to take place being in derogation of the rule of unanimous approval, at the same time gave the right to the non-assenting shareholder, upon proper notice, to receive the appraised value of his shares fixed by an appraisal committee or by arbitration.[19]

After the non-assenting shareholder complies with the objective requirements of the act (either by voting his shares contra the plan of consolidation or by forwarding his statutory notice of dissent to the presiding officer, or both) an appraisal committee is formed for the purpose of evaluating the shares. Any appraisal made by the com-

19. Although the sense of the opinion of the Court of Appeals for the Third Circuit is that the act in question encourages consolidation, no purpose was expressed by the congress in approving the act to encourage the centralization of the banking industry into limited hands.

mittee is subject to review by the Comptroller of the Currency, whose reappraisal is final and conclusive.

Not only does the act fail by any specific language to deny the right of an appraisal to any particular category or group of non-assenting shareholders, but the clear intendment of the act is that **any** shareholder who has **voted** against the plan of consolidation or who has forwarded the statutory **notice** of dissent, is entitled to receive the appraised value of his shares (whatever that value is ultimately determined to be by the committee of appraisers, and the Comptroller of the Currency).

Chief District Judge Kirkpatrick pointed out that the congress: "*. . . chose to accord the privilege to 'any' stockholder, a term, if anything, more inclusive than 'a' stockholder*".[20] Chief District Judge Kirkpatrick's attention to the precise congressional text is not without precedent.[21]

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20. R. 23.

21. Chief District Judge Kirkpatrick's adherence to the precise text of the act finds support in **Denicke v. Brigham**, 45 F. Supp. 868 (DC Cal., 1942) where the court held that the congressional language in the act requiring *notice* to be sent to the stockholders of the time, place and *object* of the meeting of stockholders could *not* be construed, to include therein a provision that the notice should include a statement of the rights of the shareholders voting respectively for or against the adoption of the resolution approving the consolidation. The court there pointed out that if matters respecting stockholders' rights or interests in the event that ratification *were intended by the congress* to be included in the word "object"; "*. . . it might well be assumed, that the word in the plural form instead of the singular would be used or else all or certain incidental matters, dealt with in the statute, would have been expressly mentioned.*" (Id. at 869-70.) (Emphasis supplied.) The Court also pointed out that the fact that no question appeared to have been raised in any court respecting the form of notice required to be given stockholders under the act for a period of more than twenty years would indicate that the form of notice in question was in conformity with the statute.

The mechanics of the act giving to **any** non-assenting shareholder upon the filing of the statutory notice of dissent (or upon the voting contra the plan of consolidation) the right to receive the appraised value of his shares, have been considered by the Courts of Appeal for the Seventh and Fifth Circuits.

In **Roach v. Stastny**[22] the Court of Appeals for the Seventh Circuit held that a shareholder who has given the statutory **notice** of dissent from the plan of consolidation ceases to be a shareholder in the association, and becomes entitled to the appraised value of his shares.[23]

In **Hiatt v. Peddy**, the Court of Appeals for the Fifth Circuit[24] held that a shareholder upon announcement of a plan of consolidation is put to his election to either take the new stock of the consolidated association in lieu of his stock in the association of which he was a shareholder, or

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22. 104 F. 2d 559 (1939).

23. The Court of Appeals for the Seventh Circuit pointed out, footnote 22, *supra,* at 562, that in **Hiatt v. Peddy,** 73 F. 2d 235 the shareholder did nothing "to **manifest** his dissent from the plan." In the *Roach* case the Court of Appeals for the Seventh Circuit held that the shareholder ". . . did attempt to withdraw, *but without complying with the requirements* for effective withdrawal. * * * Abortive notice to the consolidating bank, conversations with various individuals connected with the banks, written notice to the Comptroller of the Currency of some vague objections to the management of the consolidating bank, *none of these constituted necessary* **notice of dissent** *provided for by the statute.* In the absence of such **notice,** the stockholder remains such upon consolidation of the association in which he is interested with other associations. * * *" (Emphasis supplied.) The requirements of the present statute, are either a vote against the plan or ". . . notice in writing at or prior to such meeting to the presiding officer . . ." (The statute formerly provided for notice to the directors.)

24. Footnote 18, *supra.*

to "*dissent and take the value of his old stock*". That court held that the act "*. . . adopts the simple method of providing in effect that all shareholders except those who promptly dissent, give their consent*".[25]

Although the congressional language clearly provides an *objective* standard for determining whether a shareholder is entitled to the appraised value of his shares,—whether he casts a vote contra the plan of consolidation, or files a notice contra the plan of consolidation—the Court of Appeals now holds that such compliance by a shareholder with such objective standard is not sufficient; that an inquiry by the association of which he is a shareholder (or by the courts, or by both) into his subjective "**motives and hidden sentiments**", is not only proper, but controlling. We have uncovered no decision by an American court which goes so far as to make the subjective state of mind of a

25. The Court of Appeals for the Fifth Circuit stated (at 236):

"A shareholder who does not vote for a consolidation, which nevertheless is effected, 'may give notice to the directors of the association in which he is interested within twenty days from the date of the certificate of approval of the comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him.' 12 USCA § 33.

"Dissent is the only method the law provides whereby a stockholder of a consolidating bank may avoid being bound by the plan of consolidation. All other methods of withdrawal are precluded, not in so many words, but by necessary implication. * * * In the plan of consolidation here alleged, Peddy was put to his election to dissent and take the value of his old stock or to accept for the old new stock of the consolidated bank. The statute cannot reasonably be so construed as to leave in doubt the question who are and who are not shareholders of a consolidated bank. It adopts the simple method of providing in effect that all shareholders, except those who promptly dissent, give their consent."

shareholder in the **expression** of his dissent against proposed corporate action the sole factor conclusively determining the legal effect of such expression of dissent by vote or notice.[26]

II.

THE DECISION OF THE COURT OF APPEALS IS BOTTOMED SOLELY UPON JUDICIAL LEGISLATION.

It is platitudinous to state that federal statutes must be applied by the courts to concrete situations on the basis of what congress has written, and not on the basis of what congress might have written, or the court thinks congress should have written.[27] The rule, moreover, is settled, that the kind of procedural statute in question must be given

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26. The Court of Appeals for the Third Circuit here holds (R. 30) that petitioner is not a "bona fide" dissenter. Even under the immigration laws an *objective* test has been applied in determining the "bona fides" of status. **United States v. Prince Line**, 189 F. 2d 386 (CA 2d, 1951). The court in interpreting Section 3 of the Immigration Act (8 USC Section 203) defining "immigrant" to mean any alien departing from outside the United States and destined for the United States, except "* * * (5) a **bona fide alien seaman** serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman," holds that " . . . **what the alien says and the documents he submits** to the examining immigrant inspector, **rather than his subjective intent or concealed motive** *for wishing shore leave, are determinative of his status* as a non-immigrant. * * *" (Emphasis supplied.) (Id. at 389.)

27. **United States v. Great Northern Rwy. Co.**, 343 US 562, 575 (1952):

> "* * * It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written. * * *"

effect according to its plain meaning,[28] a plain meaning which cannot be overcome by resort to dubious legislative history.[29]

It was upon what (we submit) was not even "dubious" legislative history, but upon two fragments from the committee reports which do not support their construction of the act, that the two judges of the Court of Appeals imported into the act the controlling effect of subjective "**motives and hidden sentiments**". No language of the act, no ruling of the Comptroller of the Currency, no legislative history, no canon of construction supports such a result. Although the Court of Appeals states that it found in the committee reports on the act a "clear congressional purpose"[30] the quoted portions of the committee reports, on the contrary, reassert the congressional intent, embodied in the plain text of the act, to protect "**any**" non-assenting shareholder.[31]

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28. **Utah Junk Co. v. Porter**, 328 US 39, 44 (1946): "All construction is the ascertainment of meaning. And literalness may strangle meaning. But in construing **a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad unexpressed claims of policy** * * * " (Emphasis supplied.)

29. In **Ex-parte Collett**, 337 US 55, 61 (1949) this Court, *per* Chief Justice Vinson, stated:

". . . [t]**here is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history** which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' . . . This canon of construction has received consistent adherence in our decisions [citing cases]." (Emphasis supplied.)

30. R. 31.

31. The Court of Appeals quotes from H. R. Report No. 408, March 15, 1918, 65th Cong. 2nd Sess.:

"Proper provision is made by the proposed law to protect **any** dissenting stockholder in either corpora-

Chief District Judge Kirkpatrick noted:

"* * * It may be that Congress realized that if it denied to persons who acquire stock after the contract was made the right to exercise the privileges of other stockholders, it would mean that such of the original stockholders who might wish or be compelled to sell, during the pendency of the consolidation, could offer a prospective purchaser only a kind of restricted stock, shorn of the right of withdrawal and appraisal—a situation which might well effect the salability of the stock and the price obtainable and give the original stockholders something less than the full measure of 'protection' which the plaintiff argues is the purpose of the legislation * * *"[32]

It is nowhere suggested by the Court of Appeals that the refusal of the Chief District Judge to enter the arena of judicial legislation or his adherence to the plain and simple text of the congressional mandate leads to a result which is **absurd, futile** or **unreasonable.**[33] The Court of

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tion who does not desire to be connected with the consolidated bank." (Emphasis supplied);

and Senate Report No. 406, April 24, 1918, 65th Cong. 2nd Sess:

"This bill permits two or more national bank associations . . . to consolidate . . . and provides a means of paying in full **any** dissatisfied stockholder by arbitration." (Emphasis supplied.)

32. R. 23.

33. **United States v. American Trucking Associations,** 310 US 534, 543, establishes the rule that when the words of the Congress are not sufficient to determine the purpose of the legislature, or when the plain meaning ". . . has led to absurd or futile results," or when the plain meaning produces an "unreasonable" result, the Court may look beyond the words to the purpose of the act. The Court of Appeals refers (R. 31) to **Guessefeldt v. McGrath,** 342 US 308 (1952) to support its decision. In that case it was held [three judges dissenting] that in interpreting the term "any national" in the Trading with

Appeals does not suggest that giving to a shareholder who either votes against the plan or gives the statutory notice of dissent the opportunity of setting the statutory appraisal machinery in motion is an absurd thing to do. The Court of Appeals, confronted by clear and simple legislative language, predicates its opinion upon what it gratuitously denominates a "clear congressional purpose"—that the act shall mean something opposite to its plain import.

We cannot dwell here upon the numerous factors operating in the market place which necessitate the result arrived at by the Chief District Judge. Once, however, the simple and understandable procedure set up by the congress is departed from, then we are adrift upon a sea of uncertainties. The number of restrictions and categories which the sophisticated mind of a corporate official may conjure up out of the plain congressional language is legion.[34] The practical difficulty presented by the adjudica-

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the Enemy Act, an interpretation which would avoid decision of ". . . debatable constitutional questions" was to be preferred (at 317-8). Also, "The concern of the Trading with the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes." (at 319).

Mr. Chief Justice Vinson (with whom Justices Reed and Minton joined) dissented, because he would read the act "as it is written" (at 320). "Just the other day, we held that '[w]e are not free, under the guise of construction, to amend [a] statute' by reading 'carefully distinguished and separately defined terms to mean the same thing. Pillsbury v. United Engineering Co., 342 US 197, 199, 200 . . .".

34. A, a long standing shareholder of the association who votes against the plan of consolidation at the meeting or gives notice of his dissent to the presiding officer will be foreclosed under the Court of Appeals' opinion from obtaining an appraisal and/or receiving the appraised value of his shares, if it be shown that he secretly "desires" the

tion of changing human motives must be avoided unless explicitly demanded.

The very fact that of the four learned judges who heard the case in the courts below, Chief District Judge Kirkpatrick and Circuit Judge Staley both rejected any dissection of subjective "**motives or hidden sentiments**", in face of the objective standards provided for by the act, demonstrates the wisdom of leaving statutory amendments [35] of dubious value to an informed legislature, which alone is charged with the responsibility of investigating the total picture—economic, legal and commercial.

The necessity of certainty in the application of procedural statutes which provide the method by which nonassenting shareholders to drastic corporate action may obtain an appraisal of the value of their shares and receive such appraised value is axiomatic. Certainty *has* existed up to now. But the rule enunciated in this case by the Court of Appeals replaces the desired certainty with chaos.

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merger to go through, so that he may obtain what he thinks will be an appraised value higher than the price paid by him for the said shares. Suppose B purchases the shares with knowledge of the plan of consolidation (obtained from confidential sources before public announcement) and votes against the plan or gives his statutory notice, motivated by the "desire" to obtain what he believes will be a higher appraised value than the purchase price of his shares. Suppose C purchases stock after announcement of the plan of consolidation, but without knowledge of the pending consolidation, and, then, shortly thereafter learns of the plan of consolidation and votes against the plan or gives notice of his dissent therefrom at the meeting for the sole purpose of receiving an appraised value, which he believes will be higher than the purchase price of his shares. *Quaere*—Are A, B and C "bona fide dissenting" shareholders within the meaning of the Court of Appeals' opinion?

35. The Court of Appeals points out (footnote 1, R. 30) that the precise situation presented by the case at bar will not arise again because of the provisions of Section

This rule would not only require the non-assenting shareholder to vote or give notice, but, in addition, to *express* his *motives, sentiments* and *purposes,* and would require corporate officials to embark upon the dissection of such motives. This rule is nothing much less than a directive to corporate officials, and subsequently to the courts, to commence a round of inquisitions into the **psychology** instead of the **behavior** of the non-assenting shareholder.

Because this ruling of the Court of Appeals is without doubt likely to influence the interpretation of the corporate codes in the states, this case has an importance which transcends the immediate issues at bar. Excursions into the psychoanalysis [36] of non-assenting shareholders will disrupt the simple congressional procedure provided for in the federal act and unnecessarily confound similar procedures in the state statutes.

4b of the Act of July 14, 1952, P. L. 530, which provide that the appraisal provisions of Sections 33, 34 and 34a of the Act of November 7, 1918, as amended, USC Title 12, ". . . shall be applied only to shareholders of and stock owned by them in a bank or association being merged into the receiving association." The amendment still provides, contrary to the opinion of the Court of Appeals, that "* * * **any** shareholder of any association or State bank to be merged into the receiving association *who has* **voted against** *the merger . . . or has given* **notice in writing** *. . . that he dissents from the plan of merger,* shall be entitled to receive the value of the shares held by him . . . " (Emphasis supplied.) Congress thus failed in its amendment of July 14, 1952, to incorporate into the act any limitation based on subjective factors as established by the opinion of the Court of Appeals in this case.

36. Chief District Judge Kirkpatrick recognized the futility of the psychoanalysis required by making a ". . . **restriction depend upon the buyer's motives and purposes in acquiring the stock or the state of his mind at the time of the purchase.**" Compare Circuit Judge Staley's warning, footnote 14, *supra.*

If motive can this day convert a dissent into a nullity, then tomorrow motive may well nullify a shareholder's affirmative vote.

It is submitted that this rule, a sport in American jurisprudence, cannot be left undisturbed by this Court.

Respectfully submitted,

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APPENDIX "A".

The Act of November 7, 1918, c. 209, § 1, 40 Stat. 1043, Section 33 of 12 U. S. C. A. provides as follows:

"*Any two or more national banking associations* located within the same State, county, city, town, or village may, with the approval of the Comptroller of the Currency, *consolidate into one association* under the charter of either existing banks, on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association proposing to consolidate, *and be ratified and confirmed by the affirmative vote of the shareholders of each such association owning at least two-thirds of its capital stock outstanding, at a meeting to be held on the call of the directors* after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper published in the place where the said association is located, and if no newspaper is published in the place, then in a paper published nearest thereto, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting: Provided, That the capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: And provided further, *That if such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of each of the associations proposing to consolidated, any shareholder of any of the associations so consolidated, who has voted against such consolidation at the meeting of the association of which he is a shareholder or has given notice in writing*

at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to the shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of the reappraisal; otherwise the appellant shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due and be forthwith paid to said shareholder from said bank, and the share so paid shall be surrendered and after due notice sold at public auction within thirty days after the final appraisement provided for in this section.

Publication of notice and notification by registered mail of the meeting provided for in the foregoing paragraph may be waived by unanimous action of the shareholders of the respective associations. Where a dissenting shareholder has given notice as above provided to the association of which he is a shareholder of his dissent from the plan of consolidation, and the directors thereof fail for more than thirty days thereafter to appoint an appraiser of the value of his shares, said shareholder may request the Comptroller of the Currency to appoint such appraiser to act on the appraisal committee for and on behalf of such association.

If shares, when sold at public auction in accordance with this section, realize a price greater than their final appraised value, the excess in such sale price shall be paid to the shareholder. The consolidated association shall be liable for all liabilities of the respective consolidating associations. In the event one of the appraisers fails to agree with the others as to the value of said shares, then the valuation of the remaining appraisers shall govern. Nov. 7, 1918, c. 209, § 1, 40 Stat. 1043; June 16, 1933, c. 89, § 24(a), 48 Stat. 190; Aug. 23, 1935, c. 614, § 330, 49 Stat. 718." (Emphasis supplied.)